Supreme Court, U.S.
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No. 97-997

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1997

HOWARD and EVE REISS, *Petitioners,*

v.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., *Respondent.*

On Petition For A Writ Of Certiorari To The New York State Supreme Court Appellate Division, Third Department

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does a "taking" of property requiring compensation under the Fifth Amendment to the United States Constitution result when property adjacent to an electric transmission line right-of-way is devalued due to a public fear that the electric and magnetic fields produced by transmission lines are hazardous, where the uncontested proof establishes that electric and magnetic fields are not detectable by the human senses and where no allegation has been made and no proof has been offered that such fields are actually hazardous?

RULE 29.6 DISCLOSURE

The parent of respondent Consolidated Edison Company of New York, Inc. is Consolidated Edison, Inc.

Respondent Consolidated Edison Company of New York, Inc. owns a minority interest (approximately 25.6%) in Honeoye Storage Corporation. It has no other nonwholly owned subsidiaries.

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent Consolidated Edison Company of New York, Inc. ("Con Edison") respectfully requests that this Court deny the petition for certiorari seeking review of the Opinion and Order, entered December 5, 1996, of the Appellate Division, Third Department, of the Supreme Court of the State of New York.

OPINIONS BELOW

The opinion sought to be reviewed is reported at 228 A.D.2d 59, 650 N.Y.S.2d 480 (3d Dept. 1996).

The summary of decisions below set forth in the Petition (Pet. 6) is incomplete. In addition to the decisions there listed and reproduced in the Appendices to the Petition, the New York Court of Appeals dismissed Petitioners' appeal taken as of right in an order entered May 8, 1997, "upon the ground that no substantial constitutional question is directly involved." That order is reported at 89 N.Y.2d 1085, 659 N.Y.S.2d 858, 681 N.E.2d 1305 (1997), and is reproduced in the Appendix to this Brief in Opposition, at A-1.

JURISDICTION

Petitioners assert that this Court has subject matter jurisdiction under 28 U.S.C. § 1257 (Pet. 2). As more fully discussed in point "I" of this Brief, Respondent disputes Petitioners' assertion of subject matter jurisdiction on the ground that the Opinion and Order sought to be reviewed was decided on an independent and adequate state law ground.

STATEMENT OF THE CASE

In their Complaint, Petitioners alleged, among other things, that public fear of electric and magnetic fields ("EMFs") produced by, and entering their former property from, a nearby Con Edison transmission line stigmatized, devalued, and rendered the property unmarketable, thereby effecting a *de facto* physical "taking" requiring compensation under the New York and United States constitutions (R 42-43)[1]. Petitioners neither alleged nor sought to prove that EMFs are physically harmful or offensive to the human senses or that EMFs physically impair the use or enjoyment of property.

Petitioners purchased the subject property, which abuts the transmission line right-of-way, in 1984 for $ 160,000 (R 185). At that time, Con Edison's transmission line existed in its current form — a 61.4 mile-long line of 100 foot tall lattice steel towers spaced approximately 650 feet apart and carrying two 345 kV circuits (R 23-24). The first transmission line occupying the right-of-way began operation in 1932 (R 24), several years before the house on the subject property was built (R 196). The transmission line was later rebuilt and upgraded, pursuant to approvals of the appropriate public authorities (R 24-25). The portion of the line near the subject property took on its current form in 1974 (R 25), ten years before Petitioners purchased the property.

Electric and magnetic fields consist of invisible lines of force necessarily produced by electricity. These fields are

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[1] Parenthetical numbers with the prefix "R" refer to pages in the Record On Appeal filed with the Appellate Division, Third Department.

imperceptible to the human senses. Electric fields are produced by voltage and exist when a line is connected to a source of electricity, even if electricity is not flowing. Magnetic fields are produced by the flow of electricity. Both types of fields are strongest near their source and rapidly become weaker as one moves away from the source. (R 29-30).

In 1975 the New York Public Service Commission ("PSC") initiated a proceeding to investigate the possible health effects of high voltage transmission lines. In 1978 the PSC adopted an interim electric field standard applicable to transmission lines built after adoption of the standard (R 153-54). The standard was intended to limit the electric field strengths associated with new transmission lines to the average electric field strengths associated with then-existing transmission lines of similar size (R 153-54). The PSC reaffirmed the electric field standard in 1988 (R 155-56), and adopted a similarly derived magnetic field standard in 1990 (R 166-75). Neither standard is health-based, as the PSC concluded, after hearing expert testimony and examining the relevant scientific literature, that there is insufficient scientific evidence to support a conclusion that electric or magnetic fields pose health risks (R 155, R 158, R 170-71).

Under the PSC's standards, 345 kV transmission lines are to be located at least 75 feet from the edges of a right-of-way (R 174). Although the standards do not apply to the subject transmission line (because it predates adoption of the standards), the Record evidence established that the line meets those standards. The certified survey provided by Con Edison in support of its motion for summary judgment established that the transmission line is 115 feet away from the subject property at its closest point (R 24, R 38, R 59). The survey also established that the nearest tower is

approximately 125 feet from the property line and that none of Con Edison's facilities encroach upon or cross over the property (R 38, R 59).

In addition to the *de facto* taking claim, Petitioners' Complaint alleged a cause of action for trespass and sought a permanent injunction (R 40-45).

Con Edison moved for summary judgment dismissing the Complaint in its entirety. Con Edison's motion assumed *arguendo* that EMFs produced by the transmission line had extended onto the subject property (R 18).

In response to the motion, Petitioners withdrew their demand for an injunction, as they had sold the property since commencing the action (R 256). They sold the property for $ 230,000 in October, 1994 (R 191), approximately eighteen months after first placing it on the market (R 248). In an affidavit, Petitioner Howard Reiss stated that Petitioners chose to sell the property because they believed the risks associated with EMFs to be unacceptable (R 188-89). An appraisal submitted by Petitioners concluded that public fear of EMFs had decreased the value of the property by $ 100,000 (R 222). Petitioners, accordingly, reduced the amount of compensation claimed from "no less than $ 425,000" (R 44) to $ 100,000 (R 191, R 222). The appraisal, which valued the subject property as of January 14, 1995 (R 197), did not offer any evidence or opinion that the alleged public fear of EMFs was a permanent condition (see R 195-248).

The New York State Supreme Court, Westchester County, finding neither a trespass nor a taking, granted Con Edison's summary judgment motion (see Pet., Appendix B).

The Appellate Division, Third Department, affirmed the order granting summary judgment.[2] The court concluded that Petitioners had failed to raise a triable issue of fact as to whether the EMFs had physically occupied the property or otherwise interfered with their property rights. *See* 228 A.D.2d at 61-62, 650 N.Y.S.2d at 482. The court held that the evidence that EMFs are imperceptible, coupled with Petitioners' failure to allege or offer proof that EMFs are actually hazardous, established that EMFs are incapable of physically occupying or harming property. *See id.*

Petitioners appealed to the New York Court of Appeals. In their Jurisdictional Statement, they asserted that they were entitled to appeal as of right under New York CPLR § 5601(b)(1) because the action "directly involved the construction of the Constitution of the State of New York and the Constitution of the United States." The Court of Appeals *sua sponte* initiated an examination as to whether an appeal lay as of right on constitutional grounds and invited comments from both Petitioners and Con Edison on that question. Con Edison argued that the Court of Appeals did not have jurisdiction over the appeal as of right because the Appellate Division's decision rested solely on a state common law ground. The Court of Appeals agreed, dismissing the appeal on the ground that "no substantial constitutional question is directly involved." 89 N.Y.2d at 1085, 659 N.Y.S.2d at 858, 681 N.E.2d at 1305 (reproduced at A-1, *infra*). Petitioners subsequently moved for leave to appeal, but the Court of Appeals denied their motion (see Pet., Appendix C).

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[2] The Appellate Division did not address Petitioners' trespass cause of action, as Petitioners abandoned that claim on appeal. *See* 228 A.D.2d at 60 n., 650 N.Y.S.2d at 482 n.1.

Material Misstatements of Fact Contained in the Petition

Comparison of the Statement of the Case contained in this Brief with the Petitioners' Statement of the Case (Pet. 2-4) reveals numerous material factual omissions in the Petitioners' Statement of the Case. In addition, the Petition contains several material misstatements of fact:

1. Petitioners assert that "there is no disagreement that the EMFs invading the property substantially interfered with the Reisses' right to dispose of the property" (Pet. 12).

This statement is inaccurate and misleading in two respects.

First, although Petitioner Howard Reiss claimed to have measured EMF levels "substantially higher than background levels" on the property, Petitioners never offered any quantification of the EMF levels on the property (R 189).

Second, Con Edison has at no time agreed that EMFs interfered at all — let alone substantially — with *any* of Petitioners' property rights. With respect specifically to Petitioners' right to dispose of the property, Con Edison has consistently taken the position that Petitioners' alleged inability to sell the property for a price they believed to be commensurate with its value and their alleged difficulty in finding a purchaser did not constitute a restraint on their right to dispose of the property. Indeed, the fact that Petitioners succeeded in selling the property before Con Edison moved for summary judgment demonstrates that their right to dispose of the property was unimpaired.

2. Petitioners repeatedly assert that the subject property is "one of a discrete and limited number of

properties which are substantially devalued because they immediately abut a massive high voltage electric power transmission line" (Pet. i, see Pet. 15-18).

Those assertions have no evidentiary support in the Record. At no point in this litigation have Petitioners identified a single characteristic that distinguishes them from thousands of other properties adjacent to Con Edison's transmission system.

On the contrary, the proof established that the subject transmission line is 61.4 miles long, with 122.8 miles of property abutting both edges of its right-of-way, and that the subject property extends for approximately 200 feet along the right-of-way (R 59). If it is assumed that each abutting piece of property extends for 200 feet, then there would be 3,242 properties similar to the subject property abutting the right-of-way (5,280 ÷ 200 x 122.8 =3,242). If the owner of each such property were entitled to the $ 100,000 compensation sought by Petitioners, the total compensation payable in connection *with this transmission line alone* would be $ 324.2 million!

In addition, owners of property adjacent to each of the approximately one dozen high voltage transmission lines on Con Edison's system would presumably also be entitled to similar compensation. And, if owners of property adjacent to Con Edison's transmission lines are entitled to compensation, so are owners of property adjacent to all transmission lines in New York State and throughout the United States.

Thus, Petitioners' claim that the impact on the cost of electricity of recognizing their taking claim would be barely perceptible (Pet. 17) is wholly at odds with both the proof and reality.

3. Petitioners refer to "cancerphobia caused by the EMF invasion" (Pet. 17).

However, Petitioners have offered no evidence that EMFs themselves *cause* "cancerphobia" or public fear. Fear may arise out of, or be caused by, what some people say or believe about EMFs, but without proof that EMFs are actually hazardous (which Petitioners have not even alleged), it is patently inaccurate to assert that EMFs cause cancerphobia or public fear.

Taking the analysis one step farther, to imply that Con Edison is responsible for the alleged cancerphobia — and its alleged economic impact on Petitioners — because its transmission of electricity produces EMFs is neither logically nor legally supportable.

REASONS FOR DENYING THE WRIT

I.

THIS COURT LACKS SUBJECT MATTER JURISDICTION, AS THE OPINION AND ORDER SOUGHT TO BE REVIEWED WAS DECIDED ON AN INDEPENDENT AND ADEQUATE STATE LAW GROUND

Petitioners' claim is that Con Edison has effected a *de facto* physical taking of their property. Such a claim is insufficient in itself to confer subject matter jurisdiction on this Court. Moreover, because the Opinion and Order sought to be reviewed was decided on a state law ground — *i.e.*, that there has been *no* physical interference with Petitioners' property rights — rather than the construction of the Constitution, the Petition must be denied.

In the decision Petitioners ask this Court to review, the Appellate Division began its analysis by correctly noting that:

> In order to sustain a cause of action for inverse condemnation, plaintiffs must allege and prove that the defendant "has intruded onto the [plaintiffs'] property and interfered with [their] property rights to such a degree that the conduct amounts to a constitutional taking" . . .

228 A.D.2d at 61, 650 N.Y.S.2d at 482 (citation omitted).

The Appellate Division concluded that Petitioners had failed to raise a triable issue of fact as to whether there had been *any* physical interference with their property or property rights, let alone such interference as could rise to the level of a taking. The court reached that conclusion after considering the undisputed proof that EMFs are not perceptible and the fact that Petitioners neither alleged nor sought to prove that EMFs are, in fact, physically harmful or offensive to the human senses.

In effect, the Appellate Division held that an intrusion by an intangible force that neither occupies space nor presents a hazard or physical annoyance that prevents a property owner from occupying, using, or enjoying space does not physically impair any property right.

Petitioners' rather melodramatic protest that the Appellate Division established a "draconian" rule that no taking can occur unless *both* the invasion is perceptible *and* the property owner proves that the perceptible invasion causes a health hazard that makes the property unsafe and uninhabitable (Pet. 9) is, simply, inaccurate. The Appellate

Division did not hold, as Petitioners assert, that a physical invasion must be perceptible to give rise to a taking (Pet. 5); the court merely held that *when* an intrusion is imperceptible, it must be physically harmful or offensive to be actionable. Nothing in the court's decision precludes basing an action on an invasion by imperceptible substances, gases, waves, or forces — such as x-rays, radon, groundwater pollutants, bacteria, and viruses (see Pet. 5-6) — to the extent such are alleged and proven to be harmful or offensive, thereby impairing use and enjoyment of property.

Whether property rights have been interfered with is a question of state law. *See, e.g., Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1028-31, 112 S. Ct. 2886, 2900-02, 120 L.Ed.2d 798, 820-23 (1992).

Nothing in the United States Constitution precludes a New York court from determining that causing an intrusion by an intangible, imperceptible, physically innocuous force is not actionable under New York law. Indeed — contrary to Petitioners' assertion that the Appellate Division's decision is unprecedented — that decision reflects the general common law rule, as summarized in the leading treatise on tort law:

> While it is generally assumed and held that a personal entry is unnecessary for a trespass, the defendant's act must result in an invasion of tangible matter. Otherwise, there would be no use or interference with possession. Thus, it is not a trespass to project light, noise, or vibrations across or onto the land of another. These acts may give rise to liability because of a private nuisance resulting from intentional interference with the use and enjoyment of property . . .

Prosser and Keeton, *The Law of Torts* § 13, at 71 (5th ed. 1984) (footnotes omitted).

Here, Petitioners have not alleged that the intangible intrusion interfered with the use and enjoyment of the property. Therefore, their allegations would be insufficient to state claims for either trespass or private nuisance under the common law of a majority of the states.

If the entity charged with causing an intrusion by an intangible, imperceptible, innocuous force were a private party rather than a public utility possessing the power of eminent domain, this Court would unquestionably lack jurisdiction to review the Appellate Division's decision. As a defendant's mere possession of the power of eminent domain cannot transform non-actionable conduct into conduct requiring compensation, it is clear that this Court lacks jurisdiction to review the Appellate Division's decision.

II.

THE APPELLATE DIVISION'S DECISION IS FULLY CONSISTENT WITH PRECEDENT

In addition to being wholly consistent with the general common law rule, the Appellate Division's decision does not conflict in any respect with this Court's construction and application of the Takings Clause. Accordingly, there is no reason for this Court to review that decision.

From the commencement of this action, Petitioners have sought compensation for a *physical* taking. However, they have neither alleged nor sought to prove that the subject property was in any way physically impaired or damaged. What they have sought to prove is that the value of the

subject property was diminished by public fear. Thus, although Petitioners have attempted to cloak their claim in the guise of a physical taking, it is readily apparent that what they actually want is to be compensated for the economic consequences of an alleged public fear without having to prove any nexus between that fear and any actual physical effect on the subject property or its use and enjoyment.

Proceeding from their faulty premise that the Appellate Division's decision requires both perceptibility *and* health or safety risks, Petitioners wrongly analogize this case to cases involving either tangible intrusions *or* intangible intrusions that are harmful or offensive.

For example, Petitioners' heavy reliance on *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 43 S. Ct. 153, 67 L. Ed. 287 (1922), is misplaced. There, this Court held that allegations that the United States had reserved the right to fire heavy artillery over the plaintiff's property were sufficient to state a taking claim. Because it involved the right to cause an intrusion of the property's airspace by tangible objects (cannonballs), *Portsmouth* has no relevance here. That Petitioners find it "puzzling" (Pet. 12) that the Appellate Division did not discuss this inapposite case reflects deficiencies in their analysis, not the Appellate Division's.

In fact, Petitioners have failed to identify a single instance in which this Court has found a *physical* taking unrelated to either the physical occupation of space by tangible matter or the impairment of use and enjoyment by intangible matter. In an attempt to get around this problem, Petitioners contend that the impairment of other "sticks" in their "bundle of property rights" is sufficient to establish their taking claim (Pet. 11). However, even cursory consideration

of the two "sticks" allegedly impaired — "the right to dispose of one's property" and "the right to exclude others"— reveals the infirmity of Petitioners' position.

Petitioners have identified no way in which their right to dispose of the property was impaired. At all times, they retained full legal power to dispose of the property, as evidenced by the fact that they sold the property approximately four months after commencing this action. That market forces may have delayed the sale and resulted in a lower price than they would have liked hardly amounts to a restraint on their right to dispose of the property.

Petitioners' contention that by causing EMFs to enter onto the subject property Con Edison interfered with their right to exclude others assumes too much. The pertinent question is whether Petitioners acquired the right to exclude EMFs from the property when they purchased the property in 1984. *See Lucas*, 505 U.S. at 1027, 112 S. Ct. at 2899, 120 L. Ed. 2d at 820.

When Petitioners purchased the property, the transmission line had existed in its current form for ten years, and Con Edison had been using the adjacent right-of-way for electric transmission for more than 50 years.. It is reasonable to posit that persons who buy property immediately adjacent to existing transmission lines take such property subject to the physical conditions created by normal operation of those lines. Although it is not reflected in the Appellate Division's decision, much of the questioning on oral argument focused on the fact that Con Edison's operation of the line predated Petitioners' purchase of the property and did not change in any way during the time Petitioners owned the property.

The fact that Petitioners voluntarily purchased the property with full knowledge that a major transmission line was located adjacent to it also belies Petitioners' assertions that they are purely passive victims who have been burdened with costs that users of electricity should properly bear.

Petitioners, moreover, voluntarily subjected themselves to the market forces that they allege to have resulted from Con Edison's operation of the transmission line. Absent allegations or proof that the line is dangerous, they cannot legitimately claim that Con Edison's operation of the line forced them to sell their property at a reduced price at the particular time they chose to sell it. Furthermore, Petitioners offered no proof — via their appraisal or otherwise — that the alleged public fear is permanent.

In short, Petitioners freely chose when to sell the property and are themselves responsible for the economic consequences, if any, of their decision to sell the property. Con Edison has done nothing but operate a transmission line, the location and configuration of which has been found to be consistent with the public interest. Petitioners have neither alleged nor sought to prove that Con Edison did anything to create or encourage the alleged public fear of EMFs. This case is not about Con Edison or its customers unfairly imposing a burden on Petitioners; it is about Petitioners attempting to have Con Edison and its customers bear the economic consequences of Petitioners' voluntary choices and actions.

CONCLUSION

For the reasons discussed in this Brief, the Court should deny the Petition.

Dated: January 13, 1998

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